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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-275

OSCAR MAYER & CO., ROBERT M. BOLZ, N.D. OTTENS, DONALD L. PAUL, PAUL F. GOULD,

Petitioners,

vs.

JOSEPH W. EVANS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT, JOSEPH W. EVANS

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BRIEF FOR RESPONDENT, JOSEPH W. EVANS

OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals on Rehearing (Cert. Pet. App. A15-A21), affirming the District Court, issued on July 6, 1978, is reported at 580 F.2d 298. The Opinion of the District Court for the Southern District of Iowa of July 8, 1977, denying Petitioners' Motion to Dismiss, is unofficially reported at 17 FEP Cases 218, and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A1-A7).

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals on Rehearing was entered on July 6, 1978 (Cert. Pet. App. A15-A21), and a Petition for Rehearing *En Banc* was denied on July 7, 1978 (Cert. Pet. App. A22). The Petition for a Writ of Certiorari was filed on August 18, 1978, and was granted by the Court on October 30, 1978. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of Section 14(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §633(b) (hereinafter referred to as the "ADEA"). Section 14 of the ADEA, in relevant part, provides:

FEDERAL-STATE RELATIONSHIP

> (a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of an action under this Act such action shall supersede any State action.
>
> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated . . .

Also relevant is Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c), which

is set forth in full in the Appendix (App. 9).[1]

QUESTION PRESENTED

In states having laws prohibiting age discrimination in employment and establishing agencies to grant or seek relief from such discriminatory practices, does Section 14(b) of the ADEA create a mandatory prerequisite of resort to state proceedings prior to filing a civil suit in Federal District Court under the ADEA?

STATEMENT OF THE CASE

Respondent Evans ("Evans") was employed by Petitioner Oscar Mayer & Co. ("Oscar Mayer"), as a hog buyer for 23 years at Oscar Mayer's Davenport, Iowa, plant until his retirement on January 31, 1976. (App. 4.)

On March 10, 1976, pursuant to Section 7(b) of the ADEA, 29 U.S.C. §626(b), Evans filed a timely notice of his intention to sue Oscar Mayer under the ADEA with the United States Department of Labor, claiming that he had been forced into early retirement under threat of discharge by Oscar Mayer. (App. 4,5.) The U.S. Department of Labor was unable to resolve the claim. (App. 5.) Thus, on March 7, 1977, Evans brought this ADEA action in the United States District Court for the Southern District of Iowa, Davenport Division, alleging that his forced retirement at Oscar Mayer on January 31, 1976 constituted age discrimination prohibited by the ADEA. (App. 1-6.)

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[1] Since the initiation of this lawsuit, the ADEA has been amended by the 1978 Amendments to the Age Discrimination in Employment Act, Pub. L. 95-256, 92 Stat. 189. The Amendments are not relevant to the questions raised in this case.

Oscar Mayer moved to dismiss the complaint for lack of jurisdiction over the subject matter, alleging that Section 14(b) of the ADEA required Evans to file a timely complaint of age discrimination with the Iowa Civil Rights Commission. (App. 7.) Evans has conceded in this case that he has made no resort to the Iowa Civil Rights Commission. On August 8, 1977, the Motion to Dismiss was denied by the District Court, which held that "such resort is not a mandatory nor jurisdictional prerequisite to the filing of an ADEA in federal court". (Cert. Pet. App. A6.)

On April 5, 1978, a divided panel of the Court of Appeals for the Eighth Circuit reversed the decision of the District Court and held that resort to the state agency was a procedural prerequisite to a lawsuit under the ADEA. However, the majority observed that a "definitive answer cannot be found in either the language of the statute, its legislative history, or the policy behind it", and that ". . . substantial support can be found for either conclusion". (Cert. Pet. App. A10.)

Evans filed a petition for rehearing and suggestions for rehearing *en banc*. The Secretary of Labor, on April 26, 1978, was permitted to file an *amicus curiae* brief in support of the optional nature of Section 14(b) urged by Evans. On July 6, 1978, the same panel of the Court of Appeals granted the petition for rehearing, withdrew its former opinion, and affirmed the District Court's order that Section 14(b) did not create a mandatory prerequisite to the filing of a suit under the ADEA. The Court held that "such an individual has the option of proceeding first before the state agency and then in the federal court or proceeding initially in the federal court without prior resort to the state agency". (Cert. Pet. App. A19.)

SUMMARY OF ARGUMENT

The plain language of Section 14(b) does not impose a mandatory prerequisite requiring prior resort to state proceedings before filing a civil suit in federal court under the ADEA. The strength of the Petitioners' argument rests largely upon the analogy between Title VII of the Civil Rights Act of 1964, specifically Section 706(c), and Section 14(b) of the ADEA. However, Evans believes that this analogy is seriously misplaced. Further, Evans' interpretation is supported by the significant difference in language between these two sections, the establishment of concurrent state and federal jurisdiction under the ADEA, the fact that Section 14(a) of the ADEA mandates federal action to supersede all state proceedings, and the relationship between Section 7 and Section 14 of the ADEA.

The legislative history of the ADEA is not instructive on the proper interpretation to be given Section 14(b). However, the legislative history of the 1978 Amendments to the ADEA provide extrinsic support for the position urged by Evans.

Interpretation of Section 14(b) urged by Evans is consistent with the notion that the ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the Congressional purpose of ending age discrimination in employment. Further, if not construed in this manner, the ADEA's purpose would be frustrated rather than fulfilled by the creation of a procedural requirement which in many instances would prevent an otherwise meritorious age claim from being considered.

Finally, prior resort to state proceedings is, in any event, not jurisdictional. Therefore, noncompliance with Section 14(b) may be allowed for equitable considerations, and those considerations apply to this case.

ARGUMENT

I

SECTION 14(b) OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT DOES NOT REQUIRE AN AGGRIEVED INDIVIDUAL TO RESORT TO PROCEEDINGS UNDER STATE LAW PRIOR TO THE FILING OF A FEDERAL ACTION UNDER THE ADEA.

A. Introduction

The Age Discrimination in Employment Act was enacted in 1967 for the express purpose of promoting "employment of older persons based on their ability rather than age" and prohibiting "arbitrary age discrimination".[2] The Act makes it unlawful for employers, employment agencies and labor organizations to discriminate on the basis of age, the protected group being, at the time of the initiation of this action, those persons between the ages of 40 and 65.[3]

The sole issue before the Court involves the interpretation and application of Section 14(b) of the ADEA. Section 14(b) provides that:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated."

[2]29 U.S.C. §621(b).

[3]29 U.S.C. §631. Subsequent to the filing of this action, the upper age limit was amended to 70 years of age by the Amendments to the Age Discrimination in Employment Act, Pub. L. No. 95-256, 92 Stat. 189. The amendments are not relevant to the questions raised in this case.

Evans urges that Section 14(b) does not create a mandatory prerequisite requiring resort to state proceedings prior to the initiation of a suit under the ADEA. Rather, Evans believes that the purpose of Section 14(b) is merely to give the state time to act if the aggrieved individual chooses to employ state proceedings and remedies prior to initiation of Federal suit. Oscar Mayer, on the other hand, contends that Section 14(b) is a mandatory prerequisite to the institution of a Federal action under the ADEA, and thus, in states having laws prohibiting age discrimination in employment and establishing authorities to enforce these laws, aggrieved individuals must file a timely charge of age discrimination with these state authorities.[4]

Five Courts of Appeals, four of them within the preceding year, have considered this issue. The Eighth Circuit, in their opinion below, held that prior resort to state proceedings is not a procedural prerequisite to a Federal suit under the ADEA. 580 F.2d 298 (Cert. Pet. App. A15-A21). The Third Circuit reached the same conclusion in its unanimous *en banc* decision in *Holliday v. Ketchum, MacLeod & Grove, Inc.*, ___ F.2d ___, 17 FEP Cases 1175 (3d Cir. 1973), reversing its earlier decision of *Goger v. H.K. Porter Co.*, 492

[4]However, both parties agree that an aggrieved individual who does apply initially to the state for relief must then wait at least sixty days before instituting an action under the ADEA in Federal Court.

F.2d 13 (3d Cir. 1974).[5] The Sixth Circuit reached the same conclusion as the Eighth and Third Circuits in *Gabriele v. Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), petition for *cert.* pending (No. 78-1).[6]

The Second Circuit has reached a contrary result in *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir. 1978), petition for *cert.* denied (No. 78-5568), December 4, 1978), as did the Ninth Circuit in *Curry v. Continental Airlines*, 513 F.2d 691 (9th Cir. 1975), in dictum.

For the reasons set forth below, Evans submits that his interpretation of Section 14(b), which provides an aggrieved individual with the option of pursuing state remedies or proceeding directly to Federal Court and instituting an action under the ADEA, is consistent with the clear and plain language of the ADEA, the Congressional intent and concern behind the ADEA to eliminate the delays occasioned by administrative proceedings, and the remedial nature of this legislation.

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[5]This is also the position taken by the Secretary of Labor, who is charged with enforcement responsibility under the ADEA. The Secretary of Labor filed an *amicus curiae* brief below in support of Evans' petition for rehearing. The Third Circuit, in *Holliday*, 17 FEP Cases at 1180, found "it significant that the Secretary has urged that the ADEA affords complainants a choice of forum"; accord: *Goger*, 492 F.2d at 18 (concurring opinion). Additionally, "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

[6]The Third Circuit has followed its decision in *Holliday* in *Smith v. Jos. Schlitz Brewing Co.*, ___ F.2d ___, 17 FEP Cases 1188, petition for *cert.* pending (No. 78-419); and the Sixth Circuit has followed its decision in *Gabriele* in *Simpson v. Whirlpool Corp.*, 537 F.2d 957, petition for *cert.* pending (No. 78-53).

Oscar Mayer's position that Section 14(b) requires mandatory resort to state proceedings prior to filing an action under the ADEA, creates a procedural obstacle and pitfall for unsuspecting individuals which deprives many aggrieved individuals with meritorious claims of their day in court. As a result, the objective of this remedial legislation, which is to promote the employment of older workers based on their ability rather than their age, would be thwarted.

B. The Plain Language Of Section 14(b) Establishes That No Initial Resort To State Proceedings Is Required.

Nowhere in the plain language of Section 14(b) is a mandatory prerequisite established. It states:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age in establishing or authorizing a State authority to grant or seek relief from such discriminatory practices, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."

Although the interpretation urged by Oscar Mayer of Section 14(b) would require aggrieved individuals to resort to state administrative proceedings, the plain and express terms of Section 14(b) certainly impose no such requirement. Rather, the language "carefully avoids what would have been a simple statement of an exhaustion requirement" if that were intended. *Smith*

v. Jos. Schlitz Brewing Co., 419 F.Supp. 770, 774 (D. N.J. 1976), accord: *Bertrand v. Orkin Exterminating Co.*, 419 F.Supp. 1123, 1126 (N.D. Ill. 1976); *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975); *Goger v. H.K. Porter Co.*, 492 F.2d 13, 17-18 (3d Cir. 1974) (Judge Garth concurring).

This plain language of Section 14(b) recently led the Third Circuit Court of Appeals, consistent with the majority opinion of the court below, to conclude that Section 14(b) does not set forth a mandatory prerequisite to civil suit under the ADEA. In *Holliday*, 17 FEP Cases at 1179, the Third Circuit held, regarding the plain language of Section 14(b):

> "The language of the ADEA itself strongly supports our conclusion that no initial resort to state age discrimination remedies is required. The statute nowhere explicitly imposes a resort to state proceedings as a precondition to instituting federal suit."

This is entirely consistent with the construction given Section 14(b) by the trial court in this matter, which held that Section 14(b):

> ". . . does not expressly command the commencement of proceedings under state law. . . . This section is entirely consistent with the interpretation that only when resort has been made to a state agency is the sixty day waiting period mandatory. . . . It does not mandate initial filing with the state agency." (Cert. Pet. App. A2-A3.)[7]

Therefore, the plan language of Section 14(b) is entirely consistent and supportive of Evans' position that this section allows an aggrieved individual the

[7]Accord: *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975).

choice of initial state proceedings or the filing of an ADEA action in federal district court.

C. The Interpretation Of Section 14(b) Urged By Petitioners Is Contingent Upon The Analogy Of Section 14(b) Of The ADEA To Section 706(c) Of Title VII. However, This Analogy Is Misplaced. Compelling Reasons Exist For Construing Section 14(b) Differently Than Section 706(c).

1. The Misplaced Title VII Analogy.

Throughout the entire course of litigation in this case, Oscar Mayer has consistently and unsuccessfully attempted to analogize Section 14(b) of the ADEA to the somewhat similar language appearing in Section 706(c) of Title VII of the Civil Rights Act of 1964.[8] Although the language of the two sections appear to be similar in nature, there are compelling reasons, set forth below, that mandate a different construction for Section 14(b) of the ADEA. Although courts have "recognized the parallels between the ADEA and Title VII of the Civil Rights Act of 1964", they have been careful to caution ". . . against blindly applying Title VII reasoning and results to ADEA cases". *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 953 (6th Cir. 1978). Unquestionably, both Title VII and the ADEA are aimed at eliminating discrimination in the workplace; however, the ADEA "is embodied in a separate act and has its own unique history . . ." *Laugesen v. Anaconda Company*, 510 F.2d 307, 312 (6th Cir. 1975). This would seem to indicate, as the trial court held below,

[8]42 U.S.C. §2000e-5(c).

"that automatic adoption of Title VII guidelines would be inappropriate". (Cert. Pet. App. A4.) Therefore, it does not follow, as Oscar Mayer contends, that because the courts have held that an individual must resort to appropriate state proceedings before suit may be filed under Title VII,[9] that this construction of Title VII must be automatically and mechanically carried over to the ADEA.

This rejection of the Title VII analogy prompted the United States Court of Appeals for the Third Circuit in *Holliday*, 17 FEP Cases at 1178, to observe:

> "As we have previously noted, the majority opinion in *Goger* reached its conclusion through an almost exclusive reliance on an analogy between procedures prescribed under Title VII and those applicable under the ADEA. We now know however that such reliance was unwarranted. . . . The critical premise supporting the majority opinion's reasoning in *Goger* having been undercut by the Supreme Court's interpretation of the ADEA, the *Goger* conclusion that prior resort is necessary must also fall.
>
> In sum, *Lorillard* compels us to disavow the *Goger* majority's reliance on an analogy to Title VII procedure—a reliance which it now appears was 'misplaced'. 46 L.W. at 4152, 16 FEP Cases at 888." (Footnotes omitted.)

In *Lorillard v. Pons*, 434 U.S. 575, 582 (1978), this Court observed that the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to

[9] *Love v. Pullman Co.*, 404 U.S. 522 (1972); *Olson v. Rembrandt Printing Co.*, 511 F.2d 1288 (8th Cir. 1975); *DuBois v. Packard Bell Corp.*, 420 F.2d 973 (10th Cir. 1972).

incorporate fully the remedies and procedures of the FLSA". Thus, although the ADEA reflects the substantive provisions of Title VII, it incorporates, but for express changes, the procedures of the FLSA. As *Holliday*, 17 FEP Cases at 1178, points out, the FLSA "does not require any, let alone prior, resort to state proceedings in order to redress FLSA violations. 29 U.S.C. §§216-217."

Thus, although there is no express counterpart to Section 14(b) in the FLSA, as Oscar Mayer correctly points out,[10] Evans' position is entirely consistent with the expressed procedural requirements of the FLSA, which does not require any prior resort to the filing of a federal suit. To this extent, Petitioners' reliance on Title VII appears misplaced.

2. The Language Of Section 14(b) Is Not The Mirror-image Of Section 706(c) Of Title VII: Unlike Title VII, Section 14(b) Of The ADEA Establishes Concurrent Jurisdiction.

Although Oscar Mayer characterizes the wording of Section 14(b) of the ADEA and Section 706(c) of Title VII as identical, in fact, an important distinction exists between the language of these two acts. The United States Court of Appeals for the Third Circuit, in *Holliday*, 17 FEP Cases at 1179, recognized the important distinction in language between Section 14(b) of the ADEA and Section 706(c) of Title VII when it held:

[10] Brief for Petitioners, at 16.

"The latter states that 'no charge may be filed' until after the sixty day waiting period. This prevents all Federal action during the waiting period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in Federal Court. The sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says 'no suit may be brought' until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible concurrent administrative action by the state agency and the Department of Labor. *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 194, n.8 (3d Cir. 1977). The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in Federal Court. *Gabriele v. Chrysler Corp.*, 573 F.2d at 954, 17 FEP Cases at 203."[11]

The effect of this distinction in the statutory language between the two sections of these acts is that Title VII provides for consecutive state and federal administrative proceedings, while Section 14(b) permits concurrent federal and state administrative proceedings. Under Title VII, Section 706(c) provides that "no charge may be filed" with the EEOC until after the state has been afforded its minimum sixty-day period. Thus, during this period, all federal action is precluded, since the filing of a charge is a mandatory prerequisite

[11]Accord: Note, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. Chi. L. Rev. 457, 475-80 (1977).

to any further administrative action by the EEOC and to a Title VII federal suit. Thus, under a Title VII action, Section 706(c) mandates a minimum two month period of exclusive jurisdiction by the state agency. The clear import of this distinction is that state proceedings are given less deference under the ADEA than under Title VII by establishing concurrent state and federal jurisdiction under the ADEA.

3. Section 14(a) Of The ADEA, Unlike Title VII, Mandates That Initiation Of Federal Action Supersedes All State Proceedings.

Section 14(a) of the ADEA,[12] for which Title VII has no counterpart, provides that upon commencement of an action under the ADEA, all state proceedings are superseded. Thus, even under Oscar Mayer's view of this action, Evans could have totally cut off any administrative action by the Iowa Civil Rights Commission simply by waiting sixty days and beginning this Federal Court action.

This ability of an aggrieved individual to supersede all pending state proceedings by filing a Federal Court action a scant sixty days after the notification to state authorities, prompted the Third Circuit, in *Holliday*, 17 FEP Cases at 1179, to comment:

> "It would indeed be incongruous to attribute an intent to Congress to mandate resort to state proceedings when those proceedings need not be concluded, and would in any event be necessarily superseded by the filing of a federal suit."[13]

[12]29 U.S.C. §633(a).

[13]Accord, *Gabriele v. Chrysler Corp.*, 573 F.2d 949, 954 (6th Cir. 1979); *Bertrand v. Orkin Exterminating Co., Inc.*, 419 F.Supp. 1123, 1127 (N.D. Ill. 1976); *Vasquez v. Eastern Air Lines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975).

Thus, both the *Gabriele* and *Holliday* courts concluded that the ADEA exhibits lesser deference to the states than does Title VII, and lends credence to the view that resort to state proceedings is not a prerequisite to an ADEA suit. *Gabriele*, 573 F.2d at 954; *Holliday*, 17 FEP Cases at 1179.

This construction is entirely consistent with Evans' interpretation that Section 14(b) presents the aggrieved individual with an option to proceed first with state proceedings. Assuming that an aggrieved individual does first seek the state's aid, he (or the Secretary of Labor) may file suit in Federal Court a scant sixty days later, thus superseding any state proceedings. The shortness of this modest grace period renders the ability of state proceedings to process a complaint to conclusion, including the possibility of litigation, extremely suspect. Rather, if an individual is genuinely and seriously interested in seeking and pursuing state proceedings, as would presumably be the case if the individual invoked state proceedings initially by choice, he may allow the state proceedings to work their course for up to two, or in the case of a willful violation, three years, before filing the suit in Federal Court.[14]

D. The Relationship Between Section 7 And Section 14 Of The ADEA Supports The Position That The Requirements Of Section 14(b) Are Optional.

Section 706 of Title VII sets forth the procedural steps and timetables which an aggrieved person must follow before filing suit to enforce rights protected

[14]29 U.S.C. §626(e)(1), incorporating by reference the statute of limitations in 29 U.S.C. §255(a).

under that act. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). "The comparable provision in the ADEA is Section 7, not Section 14, since it is Section 7 which sets forth the jurisdictional prerequisites for filing suit." *Vasquez v. Eastern Airlines, Inc.*, 405 F.Supp. 1353, 1355 (D. P.R. 1975). In contrast, *Vasquez*, at 1355, states that "Section 14 of the ADEA does not set forth any jurisdictional steps for instituting suit, but deals solely with the relationship between Federal and State laws."

Thus, the procedural prerequisites for a suit under the ADEA are found in Section 7 of the Act, which provisions bear the express label of "jurisdiction" in the United States Code, and are the more likely analogue to Section 706 of Title VII. Therefore, in Title VII, the jurisdictional notice requirements appear in the same section as the language dealing with deference to state law remedies. However, under the ADEA, the reference to state law deference, Section 14(b), is isolated from the other procedural prerequisites and is part of a section entitled "Federal State Relationship" and is captioned "Limitation on Federal Action upon Commencement of State Proceedings". Several courts have noted this distinction and have relied upon it in holding that Section 14(b) is optional and that ". . . Congressional concern" regarding Section 14 of the ADEA ". . . was restricted to notions of comity and federalism, not to jurisdictional prerequisites". *Holliday*, 17 FEP Cases at 1180; *Bertrand v. Orkin Exterminating Co., Inc.*, 419 F.Supp. 1123, 1126 (N.D. Ill. 1976); *Vasquez v. Eastern Airlines, Inc.*, 405 F.Supp. 1353, 1356 (D. P.R. 1975).

Oscar Mayer argues that the extended filing period provided in Section 7(b) of the ADEA, giving addition-

al time to file with the Department of Labor in cases where individuals are pursuing state remedies, is somehow inconsistent with the interpretation of Section 14(b) of the ADEA offered by Evans.[15] On the contrary, as *Gabriele*, 573 F.2d at 955, points out: "One obtains the benefits of the extended filing period in §626(b)(2) *only* if he is in a 'deferral state' *and* elects to use the state's mechanisms to attempt a conciliation of the grievance." Obviously, it is only when an aggrieved individual elects to use more "time to let the state try its hand that he needs more time to notify the Secretary of Labor". *Gabriele, ibid.* Thus, the language of Section 7(b) of the ADEA is entirely consistent with the position taken by Evans that Section 14(b) is optional.

E. The Legislative History Of The ADEA Is Not Instructive On The Proper Interpretation To Be Given Section 14(b); However, The Legislative History Of The 1978 Amendments To The ADEA Provide Extrinsic Support For Respondent's Position.

1. The Legislative History Of The ADEA Is Not Instructive On The Proper Interpretation To Be Given Section 14(b).

Unlike Section 706(c) of Title VII, where Congress clearly expressed its intent to require prior resort to state proceedings,[16] the "legislative history of the

[15]Petitioners' Brief, at 17-18.

[16]Statements of Senator Humphrey, 110 Cong. Rec. 12721 (1964), reproduced at 12 of Petitioners' Brief; *DuBois v. Packard Bell Corp.*, 470 F.2d 973, 975 (10th Cir. 1972), where the Court noted that "if the legislative history of Title VII were not so manifestly clear to remove all doubt, the liberal interpretation accorded remedial legislation of this type might have some room for argument . . ."

ADEA is . . . devoid of any indication that Congress intended to restrict an individual's right to file suit under the Federal law to cases in which proceedings had first been commenced under State law . . ." *Vasquez*, 405 F.Supp. at 1357. In *Gabriele*, 573 F.2d at 953, the Sixth Circuit also recognized, after reviewing the sparse legislative history surrounding Section 14(b), the "absence of the kind of clear legislative history supporting the construction generally given" Section 706(c) of Title VII.[17] In *Holliday*, 17 FEP Cases at n.33,1180, the Sixth Circuit also noted, after their independent review of the legislative history surrounding the 1967 enactment of Section 14(b), that there exists "no support for the proposition that initial resort to state remedies is required". Thus, the legislative history of Section 14(b) of the ADEA is not instructive

[17]Interestingly, two district courts found a general Congressional intent supporting Evans' position. Judge Decker found that "Congress evidently was concerned about the impact of bureaucratic delay imposed by the establishment of an additional administrative impediment to adjudication of grievances". *Bertrand*, 419 F.Supp. at 1126. Judge Pesquera perceived a "Congressional concern to eliminate the delays occasioned by administrative proceedings which other discriminatees had encountered in bringing their cases to court under Title VII". *Vasquez*, 405 F.Supp. at 1356.

Senator Javits also expressed his concern about administrative delay when he stated: "Such delay is always unfortunate, but is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left. By utilizing the courts rather than a bureaucracy within the Labor Department as the forum to hear cases arising under the law, these delays may be largely avoided." Statements by Senator Javits, Hearings Before the Subcommittee on Labor, United States Senate, 113 Cong. Rec. 7076, 90th Cong. 1st Sess. (1967).

of its proper interpretation.[18]

2. The Legislative History Of The 1978 Amendments To The ADEA Provide Extrinsic Support For Respondent's Position.

Congress has recently engaged in a comprehensive review of the provisions of the ADEA. The results of this review, the Age Discrimination in Employment Act Amendments of 1978 (Pub. L. 95-256, 92 Stat. 189), were signed into law on April 6, 1978. In the course of Congress' careful study and deliberations of the ADEA, Congress made it explicit that its intended interpretation of Section 14(b) is precisely the same as

[18]The Petitioners, in support of their argument that the legislative history of the ADEA supports their interpretation of Section 14(b), rely on the testimony of two witnesses who appeared before the Senate Subcommittee on Labor. Mr. Biemiller, the legislative director of the AFL-CIO, was not concerned about requiring individuals to resort to state proceedings, but, rather, about "leaving the State laws unhampered in their respective jurisdictions". (Pet. Brief, at 22.) His concern was thus with the possibility of a lack of federal preemption. This was resolved by the passage of Section 14 of the ADEA, and Mr. Biemiller's concerns are fully accomplished by the interpretation of Section 14(b) urged by Evans.

Mr. Conway, of the New York Commission on Human Rights, on the other hand, was concerned with "avoiding any implication of preemption". (Pet. Brief, at 23.) His concern was accommodated by the fact that state proceedings, when optionally engaged in by the aggrieved individuals, are preempted only by the filing of a federal action under the ADEA, pursuant to Section 14(a). Thus, the statements by these individuals in no way support Petitioners' argument. In any event, the "individual opinions of witnesses at hearings are of dubious value in interpretation of legislation". *March v. U.S.*, 506 F.2d 1306, 1314 n.30 (D.C. Cir. 1974).

that urged by Evans and adopted by the Eighth Circuit Court of Appeals below in this case. Regarding these findings, the Court, in *Holliday*, 17 FEP Cases at 1180, stated, "It is a rare and welcome event to discover legislative history so unambiguous".

The joint conference report accompanying the 1978 ADEA Amendments adopted the Senate report's discussion of Section 14(b). The Senate report states, in relevant part:

> "Section 14(b) of the Act . . . requires that *if* the individual chooses to apply first to the State agency for relief he must give the State the prescribed minimum period in which to take remedial action before he may turn to federal courts for relief under the ADEA. *The provision does not require that the individual go to the State first in every instance.*
>
> Several courts have properly recognized this distinction . . .
>
> Other courts, however, have ruled that the complainant must go initially to the State authorities in every instance, and that failure to do so requires dismissal of the federal action . . .
>
> *It is the committee's view that an individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual.* However, as Section 14(b) makes clear, if the individual does choose to proceed initially under State law, he must give the State agency at least 60 days to take remedial action before he may commence a federal action."

S. Rep. No. 493, 95th Cong., 1st Sess. 6-7 (emphasis added), reprinted in [1978] U.S. Code Cong. & Ad. News 976, 981-82, adopted in "Joint Explanatory

Statement of the Committee of Conference," H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., 7, 12, reprinted in [1978] U.S. Code Cong. & Ad. News 1000, 1006.[19]

With regard to this legislative history, the Court, in *Holliday*, 17 FEP Cases at 1180, stated: "An interpretation of the ADEA which was feasible, if not preferable, before 1978 has now been officially ratified by the joint congressional committee assigned to study and recommend changes in the statute".

The Court, in *Holliday, ibid.*, was also concerned about the "problematic . . . impact of a 1978 joint committee report on our interpretation of a 1967 enactment. Certainly the intent of the 1978 amenders of the ADEA cannot be said to represent or reflect the intent of the 1977 Congress . . ."

The Court, in *Holliday*, 17 FEP Cases 1180, 1181, recognized "as did the Supreme Court, that although the views of a subsequent Congress 'provide no controlling basis' for inferring original Congressional intent, '[n]onetheless it is pertinent to note [the views of a subsequent congressional committee] . . . reporting

[19]The Joint Explanatory Statement of the Committee of Conference, in pertinent part, states as follows:

CONFERENCE AGREEMENT

> The House recedes with an amendment retaining the 180-day and 300-day time limitations in section 7(d), but requiring that a "charge" rather than a "notice of intent to sue" be filed with the Secretary of Labor within this period. *The 300-day limitation and related State deferral procedures are described in more detail in Senate Report 95-493 at pages 5 to 7. The conferees adopt this discussion in the Senate report.* (Emphasis added.)

. . . on certain proposed amendments to the Act.' *Haynes v. United States*, 390 U.S. 85, 87-88 n.4 (1968) . . . The views of a joint congressional committee are entitled to consideration and weight in our re-examination of the contours of" Section 14(b) of the ADEA.[20]

Inasmuch as the legislative history surrounding the 1967 enactment of the ADEA is not instructive on the proper interpretation of Section 14(b), there is no reason why the explicit and unambiguous interpretation of the 1978 Congress should not be persuasive. This is especially true because "the ADEA is remedial and humanitarian legislation which should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert.* denied (No. 77-1562, October 2, 1978).[21]

As this Court has stated in the Title VII context, because of the remedial nature of this kind of legislation, it "will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts". *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-799 (1973).

In sum, the plain language of Section 14(b), the misplaced Title VII analogy, the establishment of

[20]In a similar context, a noted commentator on statutory construction has stated, "Although comments about an earlier act in a legislative committee report on a subsequent bill are not part of the legislative history of the earlier act and therefore have less probative force in legislative history, they are entitled to consideration as an expert opinion concerning its proper interpretation." *Sands On Statutory Construction*, §49.11 (4th ed. 1973).

[21]Accord: *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93 (8th Cir. 1975); *Gabriele*, 573 F.2d at 954; *Holliday*, 17 FEP Cases at 1181.

concurrent jurisdiction, the superseding of all state proceedings, the relationship between Section 7 and Section 14 of the ADEA, and its legislative history and remedial nature, mandate the conclusion that Section 14(b) does not require prior resort to state proceedings before initiation of a federal action under the ADEA.

II

PRIOR RESORT TO STATE PROCEEDINGS IS IN ANY EVENT NOT JURISDICTIONAL; NONCOMPLIANCE WITH SECTION 14(b) OF THE ADEA MAY BE ALLOWED FOR EQUITABLE CONSIDERATIONS.

Assuming, *arguendo*, that this Court holds that Section 14(b) creates a mandatory prerequisite to the institution of federal court action under the ADEA, Joseph Evans requests that the Court incorporate and adopt the doctrine of equitable modification, utilized by lower federal courts in ADEA cases, so that he and other future litigants under the ADEA do not automatically succumb to ". . . a procedural pitfall for unsuspecting individuals which could easily serve, . . . to deprive aggrieved individuals of their day in court, thereby thwarting the objective of this remedial legislation". *Vasquez v. Eastern Airlines, Inc.*, 405 F.Supp. 1353, 1357 (D. P.R. 1975).

The doctrine of equitable modification has been utilized by the lower federal courts in situations where plaintiffs have failed to meet the requirements of Section 14(b), but nonetheless have been ". . . granted relief against noncompliance where circumstances

have been presented that indicate that the interests of justice require that equitable relief". *Reich v. Dow Badische Co.*, 575 F.2d 363 370 (2d Cir. 1978).

Several lower federal court decisions holding that Section 14(b) is a mandatory prerequisite to institution of federal court action under the ADEA apply the principles of equitable modification, and thus allow plaintiffs an opportunity to proceed to the merits of their federal age discrimination claims under the ADEA, despite their noncompliance with Section 14(b), when necessary to effect the broad remedial purpose of the statute. *Reich v. Dow Badische Co.*, 575 F.2d 363, 370 (2d Cir. 1978); *Arnold v. Hawaiian Telephone Co.*, 12 FEP Cases 400 (D. Hawaii 1975); *Goger v. H.K. Porter Co.*, 492 F.2d 13 (3d Cir. 1974); *Vaughn v. Chrysler Corp.*, 382 F.Supp. 143 (E.D. Mich. 1974); *Rodgers v. Exxon Research Engineering Co.*, 550 F.2d 834, 844, *cert.* denied, ___ U.S. ___, 98 S.Ct. 749 (January 9, 1978); *Sutherland v. S.K.F. Industries, Inc.*, 419 F.Supp. 610, 613-614 (E.D. Tenn. 1976).

Judge Bright, of the United States Court of Appeals for the Eighth Circuit, dissenting in the opinion on rehearing in this case, recognized the need for utilizing equitable modification in the appropriate case, including this one, when he stated:

> ". . . I would not dismiss the action outright, even though Evans failed to file a charge with the state agency. That requirement is not 'jurisdictional'; it is a procedural requirement, which may be subject to equitable modification when necessary to reflect the broad remedial purposes of the statute. A similar principle has been applied in interpreting various procedural requirements under Title VII

(citations omitted), and I feel it should apply in the present case." (Cert. Pet. App. A15, A21.)

Joseph Evans, in his Resistance to Oscar Mayer's Motion to Dismiss, argues that he had relied on official advice from the Department of Labor that the only requirement under the ADEA was notice to the Secretary of Labor. Moreover, Evans had no interpretation of Section 14(b) by the United States Court of Appeals for the Eighth Circuit to guide him. See, *Goger v. H.K. Porter Co.*, 492 F.2d 13, 16-17 (3d Cir. 1974). In that the district court did not reach this question in disposing of Oscar Mayer's Motion to Dismiss, if this Court adopts the doctrine of equitable modification in Section 14(b) noncompliance situations, this Court should remand this case back to the United States District Court for the Southern District of Iowa for further proceedings on Oscar Mayer's Motion to Dismiss, to allow Joseph Evans an opportunity to present and prove his equitable modification claim.

CONCLUSION

For the foregoing reasons, we respectfully request the Court to affirm the decision of the Eighth Circuit Court of Appeals, and remand this case to the district court so that the Respondent may, at last, proceed to the merits of his claim.

Respectfully submitted,

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